

ISLAND COUNTY HEARING EXAMINER

RE: Appeal	)	File No. APP220/13
	)	FINDINGS OF FACT
Appellants:	)	CONCLUSIONS OF LAW
James Moore and Sue Symons	)	AND DECISION
	)	

---

**SUMMARY OF APPEAL AND DECISION**

APPEAL: James Moore and Sue Symons have appealed a Decision made by Island County Planning and Community Development on their application for a Zoning Code Interpretation. The Planning Director issued an Administrative Determination on July 10, 2013. Moore and Symons filed a timely Appeal of that Decision on July 16, 2013.

The Zoning Code Interpretation involves issues regarding the determination of base density in the Rural zone, when a portion of the parcel is covered by water.

DECISION: All of the land area within the boundaries of a parcel or lot, whether or not covered by water, or in the Aquatic Shoreline Environment Designation, is to be used for determining base density, as the term is defined in the Island County Zoning Ordinance, Chapter 17.03 ICC. There is no outright ban on subdivision which would include the division of Aquatic Environment portions of a parcel under the Island County Shoreline Master Program.

For purposes of determining base density under the Zoning Ordinance, all of the Appellants' property, which is entirely located within any Zoning Designation, is to be taken into account, regardless of the Shoreline Environmental Designation or potential limitations on density, pursuant to the Ebey's Landing National Historical Reserve Chapter 17.04A ICC. Since the Appellants' parcel contains about 17-acres, the base density allowed pursuant to the Rural Zoning Classification of the Zoning Ordinance, is three dwelling units. If the Appellants' parcel is combined with the adjacent parcel which the Appellants own, the maximum density allowed under the Zoning Ordinance would be five units.

An Applicant for Subdivision Approval is not guaranteed a density at the maximum allowed under the Zoning Ordinance. Other considerations, including SEPA considerations, application of the Ebey's Landing National Historical Reserve Regulations, and regulations and limitations which might apply under the Shoreline Management Act and/or Critical Areas Ordinance, are just some of the regulatory factors which could be used to deny property owner the maximum density allowed under the Zoning Ordinance.

Determination of the appropriate development density allowed for any given parcel can only be determined after an application to subdivide the property has been submitted, the necessary reviews, including critical areas review, have been completed, and the factual matters necessary to appropriately apply all relevant and applicable regulations have been determined.

## **FINDINGS OF FACT**

### **INTRODUCTION**

The following Findings of Fact and Conclusions of Law are based upon consideration of the exhibits admitted herein and evidence presented at the public hearing on October 31, 2013.

### **I**

#### **PRELIMINARY INFORMATION**

Appellant: James Moore and Sue Symons

Property Location: 1084 Crockett Farm Road  
Coupeville, Washington 98239

Assessor's Parcel No. R13115-023-2250

Publication: Affidavit of Publication, received April 22 and May 20, 2013

Mailing of Notice to Appellant: July 17, 2013

Mailing of Staff Report: September 9, 2013

Date of Appeal: July 15, 2013

Date of Comprehensive Statement: August 5, 2013

Hearing Date: October 31, 2013

Exhibit Log:

1. Staff Appeal Response.
2. Staff Report.
3. Party of Record letter advising of Staff Report, dated 7/10/13.

**Tab 1 – Application**

4. Application for a Zoning Ordinance Interpretation, received 3/21/2013.

**Tab 2 – Appeal Information**

5. Letter of appeal of Administrative Decision from Larry Kwarsick to Michael Bobbink and David Wechner, received 7/13/13.
6. Comprehensive Statement, received in black in white 8/1/13, resubmitted in color on 8/5/13.
7. Email chain started 8/13/13 from Dave Bricklin and subsequent reply from Larry Kwarsick, cc'd to Paula Bradshaw regarding request to intervene, dated 8/16/13.
8. Email from Attorney Bricklin to Paula Bradshaw, Larry Kwarsick, cc: Bricklin & Newman, LLP, and Peggy Cahill with 2 attachments:
  - a. Motion to Intervene.
  - b. Declaration of David A. Bricklin in Support of Motion to Intervene
9. Brief in response to Petition to Intervene, received 8/19/13 from Larry Kwarsick.

**Tab 3 – Site Data & Case Law**

10. Site Data, no date
11. Case law related to Crockett Lake: Dillingham Development Company.
12. Case law related to Crockett Lake: 87 Wn.2d 348, SWIFT, ET AL, Appellants, v. ISLAND COUNTY, ET AL, Respondents.

**Tab 3 – Agency Comments**

13. Letter from John Bertrand, Public Works to Will Simpson, dated 4/15/13.
14. Email from Tamra Patterson, Building to William Simpson, dated 4/16/13.
15. Letter from Aneta Hupfauer, Health Dept. to William Simpson, dated 4/29/12.

**Tab 4 – Public Comments**

16. Public Comment letter from John and Kimberly Shepard to Will Simpson, received 4/29/13.
17. Public Comment email from Sarah Schmidt to William Simpson, dated 5/2/13.
18. Public Comment email from Sarah Schmidt to William Simpson, dated 5/3/13.
19. Public Comment letter from Ann Casey to William Simpson, received 5/22/13.
20. Public Comment letter from Claudia M. Newman to William Simpson, received copy 5/22/13, received original in mail 5/23/13.
21. Public Comment letter, dated 5/23/13.
22. Public Comment email from Anne Casey to William Simpson, dated 7/10/13.
23. Public Comment email from Sarah Schmidt to William Simpson, dated 7/10/13.

24. Public Comment email from Anne Casey to William Simpson, dated 7/20/13.

**Tab 5 – Notices**

- 25. Notice of Complete Application from Virginia Shaddy for William Simpson to Jon Roberts, dated 4/12/13.
- 26. Notice of Application for 092/13 ZCI sent to Whidbey News Times for posting
- 27. Affidavit of Posting the Public Notice Sign, received 4/22/13.
- 28. Affidavit of publication, received 4/22/13.
- 29. Notice of Application for 092/13 ZCI sent to Whidbey News Times for posting
- 30. Affidavit of Posting the Public Notice Sign, received 5/8/13.
- 31. Affidavit of publication, received 5/20/13.
- 32. Acknowledgement letter of notice of appeal from Paula Bradshaw to Larry Kwarsick, dated 7/17/13.
- 33. Notice of scheduled hearing from Paula Bradshaw to Larry Kwarsick, dated 8/7/13.

**Tab 7 – Correspondence**

- 34. Letter from Paula Spina to Will Simpson advising of incorrect placement of sign and CD with photos showing this, received 4/29/13.
- 35. Letter to John Reports from William Simpson advising of placement of the public notice sign, dated 4/30/13.
- 36. Email from William Simpson to Jon Roberts, RE: Placement of Public Notice Sign for Application 092/13 ZCI with attached picture, dated 5/1/13.
- 37. Email from Jon Roberts to William Simpson, RE: 092/13 Decision, dated 6/28/13
- 38. Email from William Simpson to Ann Casey, dated 7/10/13.
- 39. Email from Sarah Schmidt to William Simpson, dated 7/10/13.
- 40. Email proof of sending the staff report from William Simpson to Jon Roberts, dated 7/11/13.

**Tab 8 – Additional Appeal Information**

- 41. ICHE response to Motion to Intervene, dated 8/22/13.
- 42. Letter from Island County Planner, William Simpson to David Pater, Dept. of Ecology requesting assistance on an interpretation of the policies and regulations governing the shoreline environment in Island County, dated 8/29/13.
- 43. Email from David Pater, Dept. of Ecology to William Simpson, Island County Planner, regarding DOE assistance with SMP interpretation, dated 8/30/13.
- 44. Letter from John F. Shepard, Jr. to the Island County Hearing Examiner with two motions attached, received 8/26/13.
  - a. Motion of John and Kimberly Shepard to Dismiss Appeal, received 8/26/13.
  - b. Motion of John and Kimberly Shepard to Dismiss Appeal, received 8/26/13.
- 45. Letter from John F. Shepard, Jr. to the Island County Hearing Examiner with an attached demand for notice and a motion to intervene and a brief against the appeal, received 9/9/13.
  - a. Demand for Notice of John and Kimberly Shepard Motion to Intervene, dated 9/9/13.
  - b. Brief of John and Kimberly Shepard against the Appeal, dated 9/9/13.

46. Letter from Paula Bradshaw, Office of the Island County Hearing Examiner to Larry Kwarsick, cc James Moore & Sue Symons, Island County Planning & Community Development, and parties of record with attached Staff Response to Appeal (Exhibit 1).
47. Email notice to all parties explaining emergency continuation of hearing, dated 9/1/13.
48. Memorandum from the Island County Hearing Examiner, Michael Bobbink to David Bricklin, Larry Kwarsick, David Wechner, Mr. & Mrs. John Shepard dated 9/16/13 granting motion to intervene and providing deadlines for response to the Shepard's Motions to Dismiss.
49. Email from Larry Kwarsick to Paula Bradshaw, Dave Bricklin, Dave Bricklin, William Simpson regarding Island County Hearing Examiner's response and requesting County record regarding the shoreline designation of Crockett Lake with two attached maps from DOE.
  - a. T-31 R-1E N 16
  - b. T-31 R-1E N 18
50. Email from John Shepard to Paula Bradshaw, Dave Bricklin, Larry Kwarsick re: Shepard Motion to Dismiss because of unauthorized practice of law with attached exhibit 50 a, dated 8/29/13
  - a. RCW 36.70.970
51. Email from Sue Symons to Paula Bradshaw Cc: Larry Kwarsick, Dave Bricklin, James Moore, Ann Casey, Sarah Schmidt, John (Jack) & Kim Shepard, Paula Spina, Sue Symons, dated 9/18/13 with attached exhibit 51 a.
  - a. Declaration of James Moore / Sue Symons, responding to allegations of Mr. Kwarsick acting as an attorney.
52. Email from Bricklin & Newman, LLP to Paula Bradshaw, Larry Kwarsick, Dave Wechner, John Shepard, Dave Bricklin, Julie Taylor, Paula Spina re: Appeal of Administrative Decision "Zoning Code" Interpretation 092/13, Island County Hearing Examiner No. 220/13 APP with attached Exhibit 52 a, dated 9/19/13.
  - a. Intervener Spina and Crockett Farm's Brief in Support of Intervener Shepard, dated 9/19/13.
53. Letter setting hearing October 31, 2013 from the Office of the Island County Hearing Examiner to Larry Kwarsick, Cc: James Moore & Sue Symons, Island County Planning & Community Development, and parties of record, dated 9/25/13.
54. Affidavit of Publication, dated 9/7/13.
55. Brief submitted by Larry Kwarsick, dated 10/16/13
56. Email from Larry Kwarsick to Paula Bradshaw, Dave Bricklin, John Shepard, and David Wechner, Cc Sue Symons and James Moore with attached exhibit No. 55 dated 10/16/13.
57. Memorandum from Bricklin & Newman LLP, submitted by Claudia Newman by Email October 29, 2013.
58. (Shepard's # 6) WA State Bar Association printout: Lawyer Directory, handed in at the hearing 10/31/13.
59. (Shepard's # 8) Copy of exhibit # 51, handed in at the hearing 10/31/13.
60. (Shepard's # 4) series of documents from the file, submitted at the hearing 10/31/13.

61. (Shepard's # 7) Assessor's property details R13115-023-2250, submitted at the 10/31/13.
62. Memo from John Bertrand to William Simpson, dated 4/15/13 (exhibit # 13) submitted at the hearing 10/31/13.
63. Post Hearing submittal by Larry Kwarsick received 11/8/13 by email
64. Closing Argument from John Shepard received 11/8/13 by email
65. Closing Argument from Larry Kwarsick received 11/8/13 by email
66. Memorandum from William Simpson received 11/8/13 by email
67. Memorandum from Claudia Newman received 11/8/13 by email

#### HEARING TESTIMONY

##### List of Persons Testifying for Preliminary Motions

John Shepard, Intervener  
1112 Crockett Farm Rd.  
Coupeville, WA 98239

Larry Kwarsick  
Sound Planning Services  
P.O. Box 581  
Langley, WA 98260

James Moore  
1088 Crockett Farm Rd.  
Coupeville, WA 98239

##### List of Person's Testifying at Appeal Hearing

Larry Kwarsick  
Sound Planning Services  
P.O. Box 581  
Langley, WA 98260

Claudia Newman, Attorney for Intervener Paula Spina  
1001 Fourth Ave., Ste. 3303  
Seattle, WA 98154

John Shepard, Intervener  
1112 Crockett Farm Rd.  
Coupeville, WA 98239

James Moore  
1088 Crockett Farm Rd.  
Coupeville, WA 98239

Angie Homola  
2362 Happy Lane  
Oak Harbor, WA 98277

William Simpson  
Island County Planning & Community Development  
P.O. Box 5000  
Coupeville, WA 98239

David Wechner, Director  
Island County Planning & Community Development  
P.O. Box 5000  
Coupeville, WA 98239

John Roberts  
2299 Roberts Pond  
Coupeville, WA 98239

## II

On April 11, 2013, the Appellants herein filed a complete application for a Zoning Code Interpretation, pursuant to ICC 17.03.190.

Specifically, the Zoning Code Interpretation Request asked for an interpretation of ICC 17.03.060.C Lot/Density. The Applicants requested an interpretation as to whether or not portions of land owned by the Applicants, and inundated at different levels by Crockett Lake during different times of the year, was included in determining the density for residential development of the property, pursuant to the Rural zone requirements of the Island County Zoning Ordinance. The Base Density in the Rural zone is set by the Zoning Ordinance at one unit per five gross acres.

The Applicants also asked for an interpretation of Washington Administrative Code, Sections WAC 197-11-800 and WAC 197-11-756. WAC 197-11-800 deals with Exemptions to SEPA for shoreline property subdivision. WAC 197-11-756 relates to lands covered by water, where the Applicants were again requesting an interpretation as to whether those lands covered by water could be used as gross acres for determining base density under the Zoning Ordinance.

Island County Planning and Community Development issued a Decision on July 10, 2013. Planning decided that the WAC provisions identified by the Applicant were not the proper subjects of a Zoning Code Interpretation. Planning also decided that the portion of the Applicants' property, which consisted of lands covered by water, could not be used to determine the base density allowed under ICC 17.03.060.C.

The Decision Paragraph of the written Zoning Code Interpretation, issued by Island County Planning and Community Development, reads as follows:

**VIII – DECISION**

**Island County concludes that the lands covered by water on parcel R13115-023-2250 are subject to the Land Use Regulations of Aquatic Shorelines Designation; and that the aquatic environment does not allow for the subdivision of land or residential development. If the Applicant intends to pursue land use options on the portions of the property zoned Rural, the Applicant should submit a detailed proposal to Island County and discuss additional issues with the project site at a pre-application conference.**

This Appeal followed.

**III**

The Appellants are owners of the parcel identified in the decision language above. This parcel is approximately 17-acres in size. The record contains references which estimate that the portion of the parcel below the Ordinary High Water Mark [OHWM] of Crockett Lake is somewhere around 6.5-acres. The remaining upland portion of the parcel, should this information be accurate, would exceed 10-acres in size. Under the Zoning Code Interpretation issued by Island County Planning, the base density allowed for this Rural zone parcel would be two units, since only the area upland of the OHWM would be used to determine base density under the Zoning Ordinance, Chapter 17.03 ICC.

The Appellants disagree with this interpretation and argue that the entire, approximately 17-acres owned by the Appellants is to be used for the determination of base density. This interpretation would potentially allow subdivision of the Appellants' parcel into three parcels, with one dwelling unit allowed per parcel. The Appellants believe that the Planning Department erred in



its determination that the portion of lands covered by water is not included in calculating parcel size or base density under the Zoning Ordinance. The Appellants cite the case *Island County v. Dillingham Development Co.*, 99 Wn.2d, 215, 662 P.2d 32 (1983). Planning and the two Interveners allowed to participate in this Appeal disagree with the Appellants' interpretation of *Dillingham* and argue that it is not applicable in this situation.

In addition to the approximately 17-acre parcel that extends into Crockett Lake, the Appellants own a 10-plus acre parcel, adjacent to the 17-acre parcel. The Appellants live on this adjacent parcel. The Appellants reach their home on an easement road across Crockett Farm, owned by Paula Spina. Paula Spina, through her Attorney, moved to be granted Intervener status in this Appeal, and the request was granted by the Hearing Examiner. The owners of another neighboring property, John and Kimberly Shepherd, also requested Intervener status. This request was granted by the Hearing Examiner. Some issues raised by the Intervening Parties were issues as to whether or not the Appellants had a legal way to access the parcel extending into Crockett Lake and/or any new parcels created by subdivision; concerns about increased traffic in the area; concerns about possible violation of a view easement; and possible negative impacts on Crockett Lake and on the Ebey's Landing National Historical Reserve District, in which all of the parties' parcels are located.

#### IV

By the end of the Hearing, all the parties agreed, and the Hearing Examiner concurs, that those portions of the body of water known as Crockett Lake, waterward of the OHWM, are within the Aquatic Shoreline Environment Designation. The properties located within 200-feet upland of the OHWM are in the Natural Shoreline Environment Designation.

The Appellants' 17-acre property is located within the Rural zone. The boundaries of the Rural zone incorporate all of Crockett Lake. In addition to the Rural Zoning Classification, the property is subject to the Shoreline Management Overlay and located within the Ebey's Landing National Historical Reserve and, therefore, subject to ICC Chapter 17.04, containing regulations applicable to properties within the Reserve. Additionally, the property is subject to Critical Areas regulation and other regulations beyond the Island County Zoning Ordinance.

## V

In the Staff Report, Staff indicated that they had narrowed their decision to the only issue appropriate for a Zoning Code Interpretation Application "... -- whether the lands covered by water in Crockett Lake can be used in calculating density." The summary set forth in the Staff Report went on to state as follows:

"The Planning Department determined that the lands covered by water are subject to the land use regulations of the Island County Shoreline Master Program [SMP]. Island County further determined that the features of Crockett Lake meet the criteria of the Aquatic Shoreline Designation, and that the portion of the Applicants' property with lands covered by water is subject to the uses and regulations of the Aquatic Environment. The Aquatic Environment does not allow for residential development or the subdivision of land; however, the portion of the Applicants' property that does not consist of lands covered by water could potentially be used for residential development if a proposal met all applicable Island County standards for residential development. Island County staff recognized a number of potential constraints on the Applicants' property and recommended that the Applicant submit a more detailed proposal for a pre-application conference."

On page 6 of the Staff Report, Exhibit No. 1 in the Hearing Examiner file, Planning, again, sets forth its conclusion, as follows:

### V – CONCLUSION

**Island County did not error in issuing ZCI 092/13. The Department of Ecology has confirmed that the features of Crockett Lake are consistent with the Aquatic Environment, and that the criteria shall control over a map. Island County used a three part test to provide the decision on ZCI 092/13 in accordance with ICC 17.05.200(B.1). This test included a review of the applicable shoreline designations, SMP policies, and the underlying zoning of the parcel.**

**Island County's determination that the lands covered by water, waterward of the ordinary high water mark, should not be counted for the purposes of base density is supported by the Island County Comprehensive Plan, ...."**

Crockett Lake is probably better described, at least scientifically, as a coastal lagoon. The water in the lake is brackish, the lake level has, at least at times in the past, been controlled by a tide

gate, which would limit or allow saltwater entering the lagoon. Crockett Lake is described as a lake, under the Washington Administrative Code provisions, categorizing shorelines. For shoreline purposes, Crockett Lake is a lake. The Appellants originally argued, or appeared to argue, that the surface waters of Crockett Lake were not in the Aquatic Designation. As indicated, they have given up that argument. The surface of Crockett Lake and all areas below the OHWM are properly designated Aquatic for purposes of the application of the Island County Shoreline Management Program.

The natural processes of Crockett Lake as a coastal lagoon have been disrupted by development. However, it is understood that Crockett Lake is a sensitive and valuable habitat. All of the parties agree that residential development is not allowed in the Aquatic Shoreline Designation. The upland portion of lands surrounding Crockett Lake, but within the shoreline jurisdiction, at least in the area of the Appellants' land, is designated with the Natural Shoreline Designation. Residential development is only allowed in the Natural Shoreline Designation if it is approved, subject to a Shoreline Conditional Use Permit. It is possible that no residential development will be allowed within the 200-foot area upland of the OHWM of Crockett Lake. The record also indicates that it is at least potentially possible that the uplands of the Appellants' property in this area are wetlands associated with Crockett Lake, that in fact shoreline jurisdiction may go beyond the 200-feet from the OHWM, and that much, or all, of the areas in the Appellants' property, upland of the OHWM, may in fact be wetlands.

## VI

The Appellants have not submitted an application for subdivision. The Appellants have indicated an interest in subdividing the parcel and a determination of the base density for residential development under the Zoning Ordinance was the main reason that this Zoning Code Interpretation was sought. The Appellants have prepared some drawings which showed the division of the parcel into three parcels, all of which contain part of the land in Natural Shoreline Environment Designation and part of the land in Aquatic Designation. However, this proposal has not been submitted and no subdivision or subsequent development proposal is currently pending. The Appellants acknowledge that no residential development is allowed within the Aquatic Designation and have indicated no intent to ever request residential development in that

designation. It may also be possible to develop the parcel without placing residential development within the Natural Shoreline Designation. However this cannot be determined until there is a full wetland evaluation and a determination as to whether or not upland areas that are wetlands associated with Crockett Lake are within shoreline jurisdiction. In any case, wetlands are subject to critical areas regulation and the existence of regulated wetlands onsite would constrain the possible development that could be allowed.

## VII

Any Conclusion of Law which is deemed a Finding of Fact is hereby adopted as such. Based on the foregoing Findings of Fact, now are entered the following:

### CONCLUSIONS OF LAW

#### I.

The Appellants in this case originally submitted a Zoning Code Interpretation as described in the Findings of Fact above. Zoning Code Interpretations are allowed pursuant to ICC 17.03.190. The Purpose Section of the Code Interpretation Section of the Zoning Ordinance reads as follows:

#### **17.03.190 Code Interpretation**

The Planning Director shall interpret by written decision the text of this Chapter pursuant to the terms and conditions of this section.

- A. **Purpose.** This section provides a simple and expeditious method for clarifying ambiguities in the text of **this Chapter** or classifying Uses that are not expressly referenced. Broad latitude has been provided in the specific Uses enumerated in each land Use classification. Therefore, interpretation will be required, from time to time, to overcome inadvertent rigidities and limitations inherent whenever lists of specific Uses are established. Prohibited Uses are identified expressly. There is no presumption that a Use that is not listed is or should be prohibited. Code interpretations are used to establish the proper classification of unnamed Uses and allow for the formalization of other interpretations that may be required to effectively administer the Zoning Code. Code interpretation can be initiated by the County or requested by an Owner. [Emphasis added.]

This Section clearly states the purpose of the Zoning Code Interpretations is two-fold. One, the Zoning Code Interpretation can be used "... for clarifying ambiguities in the text of this Chapter ...." The second use is stated as "... classifying Uses that are not expressly referenced." This purpose is clearly identified as providing a method of determining the proper classification of a specific use in a zoning classification where that use does not appear in the enumerated uses. This Zoning Code Interpretation does not seek determination of the appropriate classification of a specific, unnamed Use.

The only way the questions asked by the Appellants can be properly addressed under a Zoning Code Interpretation is if it is used to clarify ambiguities in the text of Chapter 17.03, the Island County Zoning Ordinance. Although the Responsible Official will ultimately be required to resolve the issue as to whether or not a subdivision of a parcel with a portion of the lands covered by water is exempt from SEPA, that issue is not properly decided without a specific application to evaluate and, in any case, does not require resolution of an ambiguity in the Zoning Ordinance to decide. Therefore the Planning Director has no right or power under the Zoning Ordinance, as he properly determined, to issue a Zoning Code Interpretation, addressing how a Washington Administrative Code Section should be applied. A Zoning Code Interpretation can only be used to resolve ambiguities in Chapter 17.03 or to classify unnamed, but specific Uses.

The issue that the Director did address was the Appellants' request that the Director determine whether or not lands covered by water are counted in determining the gross area of a parcel for the purposes of determining base density in the Zoning Ordinance. Base density is defined in the Zoning Ordinance, ICC 17.03.040, as follows:

**Base Density:** The **maximum** number of Dwelling Units other than Guest Cottage permitted outright by a particular land Use classification. [Emphasis added.]

As can be seen from this definition, base density refers to residential development. It also refers to a Land Use Classification. Base density is the maximum number of dwelling units allowed on any given parcel in a particular Land Use Classification. Any Land Use Classification in the Island County Zoning Ordinance, which allows residential dwelling units, indicates within the

Section of the Zoning Ordinance covering that Land Use Classification the maximum number of dwelling units allowed on a particular tract or parcel.

The question of whether or not to include portions of property covered by water or in the Aquatic Shoreline Environment in determining the maximum density allowed on that parcel or tract of land would need to be a uniform interpretation covering all zoning classifications in Island County. Zoning classifications are established in ICC 17.03.050, which reads as follows:

**A. Establishment**

Island County is hereby divided into zoning classifications of such number and character as are necessary to achieve Compatible land uses within each Zone and implement the Comprehensive Plan. For purposes of this Chapter, zoning classifications shall be as follows: Rural (R), Rural Residential (RR), Rural Agriculture (RA), Commercial Agriculture (CA), Rural Forest (RF), Rural Center (RC), Rural Village (RV), Rural Service (RS), Airport (AP), Light Manufacturing (LM) and Special Review District (SD).

As can be seen from the above paragraph, shoreline environment designations, or for that matter, any other overlays, are not listed as a zoning classification.

ICC 17.03.050 B indicates the limitations on Uses and development, including subdivisions, as follows:

**B. Scope**

Within the zoning classifications **established by this Chapter**, no Building or Structure shall be erected, reconstructed, altered, enlarged or relocated, no Lot or Parcel shall be created, used or developed and no Building or Structure shall be used except in compliance with this Chapter. [Emphasis added.]

ICC 17.03.050 C.1 states in relevant part as follows:

**C. Maps of Zoning Classifications, Shoreline Environments and Overlays**

1. "Zoning classifications established by this Chapter are bounded and defined as shown on the official zoning maps contained in the Zoning Atlas of Island County, which together with all explanatory materials contained thereon, are hereby made a part of this Chapter. ..."

ICC 17.03.050 D deals with the **Interpretation of Boundaries** of zoning classifications.

Paragraphs 5 and 6 of this Section are the only paragraphs which talk about zoning classification boundaries in relationship to lands covered by, or inundated by, water. These two paragraphs read as follows:

- D. 5. **Boundaries shown as** following or approximately following shorelines of any lakes or Puget Sound shall be construed to follow the mean high waterlines of such bodies of water, and, in the event of change in the mean high waterline, shall be construed as moving with the actual mean high waterline.
- 6. **Boundaries shown as** following or approximately following the centerlines of streams, rivers, or other continuously flowing water courses shall be construed as following the channel centerline of such water courses taken at mean low water, and, in the event of a natural change in the location of such streams, rivers, or other water courses, the zone boundary shall be construed as moving with the channel centerline. [Emphasis added.]

In this case, the boundary of the zoning classification which contains the Appellants' property does not show the boundary as approximately following the shoreline of Crockett Lake. Instead it shows all of the Appellants' properties and Crockett Lake as being within the Rural zoning classification.

The Hearing Examiner concludes that in every case where a tract of land is shown to be entirely within the boundaries of a zoning classification, as shown on the Zoning Atlas of Island County, the entire parcel is to be used in determining the maximum density for residential development of that property.

In this case, the Appellants' property is completely within the boundaries of an area in the Rural zone classification and pursuant to ICC 17.03.060C Base Density is one dwelling unit per five gross acres. In reference to the Appellants' property, the total or gross acreage in the property they enquired about, is approximately 17-acres. Therefore, the base density allowed, per the Zoning Ordinance, is three dwelling units.

The same Section states that the minimum lot size in the Rural zone is five acres, but goes on to identify the possibility of smaller lots by using lot-size averaging, which would allow a lot as small as two and one-half acres on parcels over ten acres, provided that no more than three lots are created that are less than five acres. [ICC 17.03.060C.2]

The Rural lands base density is part of the “Lot/Density requirements.” Both the terms Lot and Lot Area are defined terms in the Zoning Ordinance, as set forth in ICC 17.03.040. These definitions read as follows:

**Lot:** A fractional part of divided lands having fixed boundaries and being of sufficient area and dimension to meet minimum zoning requirements for width and area. The term shall include Tracts or Parcels, including Existing Tracts or Parcels. Lot as used in this Chapter shall include both a standard section subdivision and also the corresponding equivalent fractional part of a section, for example, 1/128 of a section shall also mean five (5) acres.

**Lot Area:** The total land area within the Lot Lines.

As can be seen by these definitions, the term Lot is used to describe a parcel as having fixed boundaries and the Lot Area of a parcel is the total lot area within the Lot Lines. Total area within the lines of the property owned by the Appellants is approximately 17-acres. The maximum or base density, as used in Chapter 17.03, is based on the total area within the lines of the lot or parcel.

Additionally, the Zoning Ordinance defines Existing Lot in ICC 17.03.040, as follows:

**Existing Lot:** A Lot or Parcel of land which meets the definition of Existing and was also of record and lawfully established and maintained including those which, because of the enactment of this Chapter, no longer conforms to the land Use standards or Use regulations of the zone in which it is located.

The word Existing is also defined in the Zoning Ordinance, as follows:

**Existing:** Unless otherwise expressly stated, Existing or vested on the effective date of this Chapter, December 1, 1998.



The Appellants' lot is an existing lot because it was lawfully established prior to the effective date of the Zoning Ordinance, December 1, 1998.

The Hearing Examiner concludes, based on the above analysis, base density in the Rural zone is determined by the area within boundary lines of a legally created lot. The Hearing Examiner finds no ambiguity in Chapter 17.03, the Island County Zoning Ordinance, which would require a Zoning Code Interpretation. As to the Zoning Ordinance, a parcel of land is that area within the actual boundaries of the property at the time that it was legally created. Base density is determined by the zoning classification which a parcel is in. A parcel in the Rural zoning classification has a base [or maximum allowable] density of one dwelling unit per five acres. There is nothing in the Zoning Ordinance which supports a conclusion that for the purposes of determining density in a particular zoning classification, lands covered by or inundated by water are to be excluded. The area of a lot or parcel of land to be used in determining density for Chapter 17.03 Zoning Ordinance purposes is calculated entirely based on the gross area within the property lines of the parcel.

The term "lands covered by water" comes from WAC 197-11-756 which provides the definition of that term as it is used in WAC Chapter 197-11. To the best of my knowledge, the term does not appear in ICC 17.03, the Island County Zoning Ordinance.

## II

The conclusions reached above are adequate to resolve the Appeal. There is no ambiguity in the text of Chapter 17.03 ICC to be resolved by a Zoning Code Interpretation. Base density, as that term is used in the Zoning Ordinance, is based entirely on calculations using the total area of a lot or parcel contained within the lot lines or boundary of the property. However, a number of other issues were raised during the Appeal and are worthy of some comment. The Hearing Examiner would acknowledge that what follows is *dicta*, and is not a formal resolution or interpretation of the issues or Code Sections discussed.

Code Interpretations are limited to clarifying ambiguities in the Zoning Ordinance or establishing the proper category for uses that are unnamed in any zoning classification. However, this

Decision is consistent with portions of the Island County Subdivision Ordinance, Chapter 16.06 ICC. For example, the Purpose Section of ICC 16.06.090A and B, regarding **Preliminary Short Subdivision Approval**, reads as follows:

- A. Purpose: The purpose of this section is to provide a simple and expeditious review process to divide **property** into four (4) or fewer Lots. [Emphasis added.]
- B. Applicability: This section shall apply to every division of **land** into four (4) or fewer Lots. [Emphasis added.]

It cannot be denied that all of a parcel within the boundary lines and legally owned by person or entity is “property.” The Applicability Section states that the Short Subdivision Approval process is available to every division of land into four or fewer lots. It can be seen from these two Sections that the word property and land have been used interchangeably and should be understood to mean the same thing.

The Applicability Section of the Subdivision Chapter, ICC 16.06.030, states in the first paragraph as follows:

**16.06.030      Applicability**

Every division of land for the purpose of development, lease, sale, gift, transfer of Ownership, or other conveyance and every adjustment of property lines shall proceed in compliance with this Chapter. Use or development of all Lots shall comply with all County development regulations including Lots created following procedures that are exempt from the requirements of this Chapter.

The above Applicability paragraph requires subdivision development to comply with all County development regulations. When a parcel of land, partially inundated or covered by water, is the subject of a subdivision application, the proposal is subject to review for compliance with all County development regulations. Obviously, these would include shoreline regulations, regulations applying to properties within the Ebey’s Landing National Historical Reserve, and all properties containing critical areas, as defined in the Critical Areas Ordinance. The broad array of County Development Regulations, applicable to a land division, will, at times, result in a subdivision which is unable to obtain the base or maximum density allowed in the zoning classification in which it is located.

Planning properly identified a number of factors which could impact subdivision of the Appellants' property. The proper time, procedurally, to apply regulations, such as the Shoreline Master Program, the Critical Areas Ordinance, or Ebey's Landing National Historical Reserve, is at the time a specific subdivision proposal, which contains all of the requirements for a complete application, has been submitted to, and is before Planning.

A pre-application conference to discuss the possible limitations of the subdivision, based on applicable County regulations, is appropriate.

Using that information, the Applicant can then provide and submit a complete application, which the Applicant believes will result in a subdivision consistent with the applicable regulations.

There are a number of tools available to the Applicant to meet the various regulatory requirements that will be applied. These can include lot averaging, requesting a reduction in density, conservation easements over certain portions of the property, and identification of specific limited building sites designed to minimize or eliminate adverse impacts.

In this case, Planning confused the limited application of a Code Interpretation with what would potentially be a specific subdivision of a specific parcel. The determination of the appropriate final density for the Appellants' parcel simply was premature.

It is possible that the Appellants can put together an application which would allow a division based on maximum density allowed by the Zoning Ordinance. It is equally possible that a subdivision of that density is inappropriate on the Appellants' specific site or even that no subdivision of the Appellants' specific site is appropriate.

The Appellants' suggestion that the subdivision could move forward without an analysis of the impacts of residential development of the newly created parcels is misplaced. Lot size/density requirements under the Zoning Ordinance require that subdivisions address residential density. It must be remembered, as set forth above, that base or maximum density is specifically referring to

residential dwellings allowed. No lot in a zone where residential uses are allowed can be created unless the residential uses can be developed in accordance with all of the applicable Island County regulations. Even though the base density of a parcel may allow three single-family dwelling units, and therefore three lots, a subdivision creating those lots can only be approved if residential development on the lots will comply with all applicable County development regulations.

### III

It should be noted that the Applicability Section of the Subdivision Chapter, ICC 16.06, quoted above, applies to every division of “land.” The word land itself is not defined in the Subdivision Ordinance. One of the primary rules of statutory construction is to use the common definition of a word when an ordinance or statute does not provide a specific definition.

The issue of what the word “land” means in regard to Island County’s Subdivision Ordinance, where part of a parcel is covered by water, was addressed in *Island County v. Dillingham Development Co.*, 99 Wn.2d 215, 662 P.2d 32 (1983).

Both Planning and the Interveners argue *Dillingham* is not applicable to this case. However, the Court in *Dillingham* was dealing with a subdivision of land around and including Crockett Lake.

The Dillingham Corporation divided properties in this area using an exemption to the, then, in place Subdivision Ordinance, which allowed the creation of parcels containing five acres of land, without going through the formal subdivision process. *Dillingham* divided a large parcel of land, including lands under the surface of Crockett Lake, into parcels containing five or more acres. At least some of the parcels created had less than five acres, if the area covered by Crockett Lake was not included in determining the minimum five acre parcel size. The Washington State Supreme Court in *Dillingham* noted that the word “land” was not defined in the Subdivision Ordinance [something that has not changed], and referred to the rule of statutory construction that states that undefined terms in a statute or ordinance are to be given their common definition. The Supreme Court determined that the common definition of land includes portions of a property covered by water.

Island County had sued the Dillingham Corporation alleging that the subdivision of the Crockett Lake parcel was illegal because some of the lots created did not contain five acres of land, arguing that the portion of the parcels covered by water were not land and therefore the parcels created did not meet the minimum five acre requirement for an unregulated land segregation.

The Supreme Court Decision was unanimous. The Court could have stopped at the point where they interpreted the Ordinance and determined that “land,” as used in the Subdivision Ordinance, includes portions of parcels covered by water. However, the Court chose to go further and specifically stated that a ruling to the contrary would be an unconstitutional taking of private property without compensation.

Constitutional law, regarding takings and land use regulation, has undergone a significant change in the approximately thirty years since *Dillingham* was issued. It would not be surprising if the Courts upheld regulations which required new lots created by subdivision to contain a certain amount of dry land, excluding lands covered by water, in determining the density or minimum lot size, should a municipal government specifically and clearly adopt such a regulation.

It can be argued that the Supreme Court’s foray into commenting on the constitutionality of an ordinance, if it was different, was *dicta*. In any case, both Planning and Community Development and the Hearing Examiner would be bound by such an ordinance had Island County adopted one. Island County has not adopted such an ordinance. There is nothing in the Zoning Ordinance that indicates any intent to not include lands inundated by water in the calculation of the base density. Nor has the Island County Legislative Branch adopted a Subdivision Ordinance which gives support to an argument that portions of a property covered by water are not included as part of a property for density purposes, when land is subdivided.

#### IV

Island County Shoreline Master Program Regulations do address density determinations for shoreline properties. Residential development regulations which implement the Shoreline

Master Program Goals and Policies are set forth in ICC 17.05.200. **Residential Development** is defined as follows:

- A. **Definition:** The development of land and/or the construction or erection of dwelling units for the purpose of residential occupancy.

The subdivision of lands in zoning classifications where residential uses are allowed is residential development and is subject to the Use Requirements in 17.05.200.B. In this Section, paragraphs 1 and 6, specifically, address subdivisions. They read as follows:

**B. Use Requirements**

1. In lieu of specific density standards within this SMP, subdivisions shall reflect a density which exemplifies the designation and policy of the Shoreline Designation within which they are located; the physical capabilities of the subject site; and the density permitted in the underlying zone by Chapter 17.03 ICC.
6. Subdivisions containing marshes, swamps, lagoons, portions of floodplains, or similar wetlands shall use those areas only for the purposes of parks, open-space, or recreation facilities as permitted by Chapter 17.02 ICC.

As can be seen in paragraph B.1, above, Shoreline Master Program regulations can be used to determine residential density. In looking at density, paragraph B has us consider the designation and policy of the shoreline designation that the development will be located in, the physical capabilities of the subject site, and the density permitted in the underlying zone by Chapter 17.03 ICC. The density permitted in the Zoning Ordinance is only one factor to take into account in determining the appropriate density for development of land, subject to Shoreline Use Regulations. The other considerations may appropriately be used in the right circumstances to reduce the density permitted in the Zoning Ordinance. Since base density is the maximum residential density allowed, Shoreline Regulations could not be used to increase density. Paragraph B.6 states that subdivisions, containing marshes, swamps, lagoons, etc. are to use those areas only for certain purposes, such as parks and open-space. It does not, however, suggest that the density allowed on a parcel should be reduced solely because the parcel contains such areas. The remainder of the Use Requirements for Residential Development Section, mostly, addresses impacts on residential construction.

The Residential Use regulations also indicate that in some circumstances residences can be located in wetlands, and in other areas subject to flooding, to provide for reasonable use of the property, as defined by Chapter 17.02 ICC, the Island County Critical Areas Ordinance, and subject to certain requirements. [ICC 17.05.200.B.8]

Residential Use requirements can be used by the regulatory authority to specifically identify, on properties subject to them, specific locations where residential structures can and cannot be built. They are broad enough to, under appropriate circumstances with a proper factual foundation, limit the density allowed on a parcel based on impacts to the shoreline, shoreline habitat, and shoreline processes.

Staff cites Shoreline Environment Designations and Use Regulations [which are part of ICC 17.05.070] as authority for their determination that aquatic lands or lands covered by water are not counted for purposes of determining base density under the Zoning Ordinance. Staff points out that residential development in the Aquatic Shoreline Designation is prohibited. Staff also points out the notation on the chart, “not applicable,” is in the box for land subdivision within Aquatic Designations. Staff then reads “not applicable” to being outright prohibition on dividing lands within the Aquatic Designation.

ICC 17.05.070 ends with notes which explain the Shoreline Use/Shoreline Environments Chart. It indicates that “P” equals shoreline permitted use; “X” equals shoreline prohibited use; and “C” equals shoreline conditional use. There is no explanation as to the meaning of “N/A” box on the chart. Common usage would be “not-applicable.” However, not applicable is not the same as prohibited. The Legislative body has not indicated that subdivisions, which include dividing portions of property in the Aquatic Environment, are prohibited. The Natural Shoreline Environment Designation allows single-family development, accessory dwelling units, and land subdivision as conditional uses.

Staff noted that the Island County Shoreline Master Program states:

“The Aquatic Environment is the water surface together with

underlying lands and the water column of all marine waters, all lakes, and all streams; including but not limited to bays, straits, harbor areas, waterways, tidelands, beds and shorelands seaward of the ordinary high water mark, and associated wetlands.”

[Exhibit No. 42, Hearing Examiner file]

The basic premise of the Code Interpretation is the land within the Aquatic Environment Shoreline Designation is not used to calculate base density under the Zoning Ordinance. As can be seen from the above description of the Aquatic Environment, the areas of streams between the Ordinary High Water Marks on a parcel would have to be surveyed and calculated, and then subtracted from the parcel area to determine base density for the parcel. This would clearly be unwieldy, expensive, and contrary to all past practice. There is no language pointed out in the Code Interpretation indicating a legislative intent to require such a complicated process.

Using the reasoning of the Code Interpretation, it would apply to all areas on a parcel within the Aquatic Shoreline Environment Designation. The Hearing Examiner finds this to be an untenable conclusion.

#### V.

During the Hearing process and at the Hearing, the Interveners and Staff recognized the fact that the particular parcel of land owned by the Appellants herein was located in the Ebey's Landing National Historical Reserve. The Parties correctly recognized that any proposed subdivision or land use of this parcel would require review and application of the regulations in ICC 17.04A. Chapter 17.04A is titled, Ebey's Landing National Historical Reserve Design Review and Community Design Standards. The Island County Commissioners adopted Chapter 17.04A, pursuant to Chapter 36.70 RCW, as a "Historic Preservation District" for Island County to protect the Ebey's Landing National Historical Reserve.

The following excerpts from the Purpose Section of Chapter 17.04A.010 make it clear that land use decisions, including subdivision and the construction of new structures, are subject to the Chapter. The following quotes are out of the Purpose Section, ICC 17.04A.010.



“The overall intent and purpose of the Ebey’s Reserve design review and community design standards is to recognize that land use and specific design regulations ... are the proper and necessary concerns of local government.”

“It is also the intent that new or remodeled structures within the Reserve be designed and constructed to harmonize and be compatible with historic structures and historic settings ....”

The Purpose Statement is general enough to include land use impacts on the “historic setting” when reviewing any development, including subdivision, within the Reserve.

ICC 17.04A.010 goes on to list a number of guidelines in carrying out the Purpose. These guidelines are set out in paragraphs A through M of ICC 17.04A.010.

Paragraph B of the guiding functions indicates that one of the purposes is “... managed preservation of historic and scenic landscapes ....”

Paragraph C continues in the same vein by indicating a guiding function is “... protecting and enhancing the Reserves attraction to visitors ....”

Paragraph E of the guiding functions indicates the Purpose Chapter references assisting “... the public in making development decisions which are compatible with the Reserve’s character ....”

Paragraph H states a goal “... to aid in preserving and maintaining Scenic Easements ....”

Paragraph M, which is discussing agriculture, again states “... the purpose and intent is to preserve the rural and scenic nature and character of the landscape ....”

The Applicability Section of Chapter 17.04A.020 makes it clear that the Chapter is applicable to “landscapes,” as well as structures.

In implementing Chapter 17.04A, the various decision-makers must remain cognizant of the statement in the Applicability Section that:

Nothing in this Chapter changes any of the requirements or land use entitlements set forth in the Island County Zoning Code [Chapter 17.03 ICC].

Development is defined in Chapter 17.04A.050 as follows:

**Development:** “Any proposal which will result in ... division of land ....”

Subdivisions of property within the Historical Reserve are subject to Chapter 17.04A. A Subdivision Application is a Land Development Application which must be reviewed in light of the requirements of Chapter 17.04A in regards to “Sensitive Areas,” as used in Chapter 17.04A. The definition of **Sensitive Areas** is “**Areas where scenic, natural, cultural, or historic features are prominent.**”

Activities that are exempt from regulation under Chapter 17.04A are set forth in 17.04A.090, as either categorical exemptions or contingent exemptions. Subdivisions are not listed as an exempt activity. Construction of new residences is also not listed as an exemption in either category. Pursuant to 17.04A.110.A.13, short plat and short subdivision design, require the Planning Director to make a decision on a Level B Certificate of Appropriateness, following consultation with the Reserve Committee. This Section also requires a Level B Certificate of Appropriateness Determination by the Planning Director for proposed new residential construction in Review Area 2, where the new construction is not within 100-feet of a Historic Structure.

Pursuant to ICC 17.04A.120.D, a review of Subdivisions (Long Plats) or Planned Residential Developments are subject to a recommendation prepared in accordance with the Ordinance by the Historical Reserve Committee on the required Certificate of Appropriateness, which will then be incorporated into the Staff Report to the Hearing Examiner, containing their recommendation on the proposed subdivision or proposed Planned Residential Development.

The above is not intended to be a comprehensive review of how Chapter 17.04A might relate to the Appellants' property. The purpose is to point out sections of the Chapter that do give either the Planning Director or the Hearing Examiner authority to use Ebey's Landing National Historical Reserve Chapter to address the design and scenic impact of proposed land divisions, including the density, and the identification of building envelopes on new parcels created through a subdivision process to the degree necessary to make the development compatible with the purposes and requirements of Chapter 17.04A. However, neither the Shoreline Management Regulations, nor the Ebey's Landing National Historical Reserve Regulations are subject to, or relevant to a determination under the Zoning Code Interpretation Section of the Zoning Ordinance, as to the meaning or calculation of base or maximum density as used in the Zoning Ordinance.

## VI

Any Finding of Fact deemed to be a Conclusion of Law is hereby adopted as such. Based on the foregoing Findings of Fact and Conclusions of Law, now is entered the following:

### **DECISION**

All of the land area within the boundaries of a parcel or lot, whether or not covered by water, or in the Aquatic Shoreline Environment Designation, is to be used for determining base density, as the term is defined in the Island County Zoning Ordinance, Chapter 17.03 ICC. There is no outright ban on subdivision which would include the division of Aquatic Environment portions of a parcel under the Island County Shoreline Master Program.

For purposes of determining base density under the Zoning Ordinance, all of the Appellants' property, which is entirely located within any Zoning Designation, is to be taken into account, regardless of the Shoreline Environmental Designation or potential limitations on density, pursuant to the Ebey's Landing National Historical Reserve Chapter 17.04A ICC. Since the Appellants' parcel contains about 17-acres, the base density allowed pursuant to the Rural Zoning Classification of the Zoning Ordinance, is three dwelling units. If the Appellants' parcel is combined with the adjacent parcel which the Appellants own, the maximum density allowed under the Zoning Ordinance would be five units.

An Applicant for Subdivision Approval is not guaranteed a density at the maximum allowed under the Zoning Ordinance. Other considerations, including SEPA considerations, application of the Ebey's Landing National Historical Reserve Regulations, and regulations and limitations which might apply under the Shoreline Management Act and/or Critical Areas Ordinance, are just some of the regulatory factors which could be used to deny property owner the maximum density allowed under the Zoning Ordinance.

Determination of the appropriate development density allowed for any given parcel can only be determined after an application to subdivide the property has been submitted, the necessary reviews, including critical areas review, have been completed, and the factual matters necessary to appropriately apply all relevant and applicable regulations have been determined.

Entered this 25<sup>th</sup> day of November 2013 pursuant to authority granted under the laws of the State of Washington and Island County.

---

MICHAEL BOBBINK  
Island County Hearing Examiner

#### APPEAL PROCESS:

##### APP (Administrative Decision)

Appeal Process: This land use decision is a final determination which may be appealed by filing a land use petition in Island County Superior Court within twenty-one (21) days of its issuance. Specific requirements for the petitions contents, time and service of process, and payment of the cost of the transcription of the record of the hearing may be found in Chapter 70C of Title 36 RCW

#### APPEAL PROCESS:

##### APP (SEPA)

##### Appeal Process For SEPA Related Appeal Issues:

This decision of the Hearing Examiner is a final decision at the County level. Any further appeals must be taken in conformity with RCW 43.21C.075 and WAC 197-11-680.